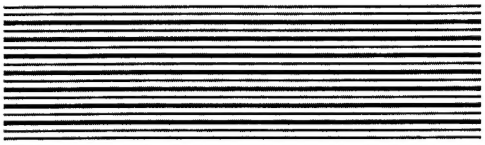
US Army Corps
of Engineers®

Pamphlet #5

ALTERNATIVE DISPUTE
RESOLUTION SERIES



OVERVIEW OF ALTERNATIVE DISPUTE RESOLUTION (ADR):
A Handbook for Corps Managers

JULY 1996

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The Corps Commitment to
Alternative Dispute Resolution (ADR)

This pamphlet is one in a series of pamphlets describing techniques for Alternative Dispute Resolution (ADR). This series is part of a Corps program to encourage its managers to develop and utilize new ways of resolving disputes. ADR techniques may be used to prevent disputes, resolve them at earlier stages, or settle them prior to formal litigation. ADR is a new field, and additional techniques are being developed all the time. These pamphlets are a means of providing Corps managers with up-to-date information on the latest techniques. The information in this pamphlet is designed to provide a starting point for innovation by Corps managers in the use of ADR techniques. Other ADR case studies and working papers are available to assist managers.

The current list of pamphlets, case studies, and working papers in the ADR series is listed in the back of this pamphlet.

The ADR Program is carried out under the proponency of the U.S. Army Corps of Engineers, Office of Chief Counsel, Lester Edelman, Chief Counsel, and with the guidance of the U.S. Army Corps of Engineers' Institute for Water Resources (IWR), Alexandria VA. Frank Carr serves as ADR Program Manager. Jerome Delli Priscoli, Ph.D., Senior Policy Analyst of IWR currently serves as Technical Monitor, assisted by Donna Ayres, ADR Program Coordinator. James L. Creighton, Ph.D., Creighton & Creighton, Inc. Serves as Principal Investigation of the contract under which these pamphlets are produced.

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OVERVIEW OF ALTERNATIVE DISPUTE RESOLUTION (ADR)

As a Corps manager, you cope with disputes everyday. They occur in all Corps units, whether planning, real estate, regulatory functions, construction, operations, or human resources. You may find yourself resolving disputes over policy or regulations, or acting as a referee between functions. You also represent the Corps in disputes with other organizations. The truth is that while functions, regulations and structure may change, whenever you manage people there will be disputes.

Disputes are a fact of life. The question is how you manage them. You can avoid a dispute, but that has a way of coming back to haunt you. You can engage in confrontation, but sometimes that leads to bitter battles that are not only costly but may damage important working relationships. You can get a decision from a higher authority, whether a boss or a judge, but there are always costs and risks associated with that as well.

The best solution is an agreement between the parties to the dispute. But how can you get such an agreement? That's what Alternative Dispute Resolution -- or the common shorthand "ADR" -- is about. ADR provides you, the Corps manager, with new tools to reach *mutual agreements*. These tools can be used to get agreements within your own organization, reducing the amount of energy lost to unproductive conflict or personal animosity. These tools are also helpful in getting agreements between the Corps and other organizations, getting a commitment to a common goal, and reducing the costs and delays associated with litigation.

This guide provides an overview to the basic concepts behind ADR, and the range of ADR techniques you may find helpful as a manager. The appendices provide more information about how ADR has been used in the Corps, and the resources upon which you can draw.

What Is A Dispute?

Different people have different goals and interests. That's so obvious it's almost a cliché. But it is also why we have conflict. Most of the time, we simply pursue our different interests, but occasionally as people pursue those goals and interests, they clash. When they reach a point of incompatibility or non-reconciliation, we describe it as a dispute or conflict.[1] There is always the potential for conflict, but it takes something more to create the spark that brings about a dispute.

1 In this pamphlet we've used the terms "dispute" and "conflict" as if they are interchangeable. In the academic literature, some scholars do define a difference.

Sometimes that spark is provided by competition or by change. The situation itself may force a clash. Some typical situations that can lead to disputes include:[2]

- -- interdependence of people and tasks
- -- jurisdictional ambiguities
- -- functional overlap (turf)
- -- competition for scarce resources
- -- differences in organizational status and influence
- -- incompatible objectives and/or methods
- -- differences in behavioral style
- -- differences in information
- -- distortions in communication
- -- unmet expectations
- -- unmet needs or interests
- -- unequal power or authority
- -- misperceptions

Disputes always involve at least two parties, each of whom is trying to do a good job of meeting his or her own objectives. By the nature of the situation or circumstances, they come to see each other as obstacles to meeting their objectives. Now we have a dispute.

Unless there is some sort of intervention, this dispute may grow to the point that the parties come to see each other as adversaries, even as "the enemy." Communication becomes distorted. People view each other as stereotypes, not as human beings. Each new escalation in aggressive behavior is justified as a counter-response to the other person's perceived aggression. When this kind of polarization occurs, most of us assume that we are now in a struggle to "win," even if it means that the other person will lose. We have a "win/lose" battle. Or, it is sometimes called a "zero-sum game," meaning that everything you gain -- dollars, status, power, authority -- must be at someone else's expense (or vice versa).

When this kind of dispute occurs, it is usually dysfunctional, whether within or between organizations. It can prevent people from working together even when they share common goals. It can cause such anger and stress that the relationship is destroyed, even though it has been and could continue to be of benefit to the parties. Disputes chew up time and resources needed for more productive projects.

While conflict is inevitable, it doesn't have to end in polarized disputes. In fact, if handled well, conflict can even be healthy. Among the positive things conflicts can bring about are: 1) conflicts identify problems that need to be solved; 2) conflicts brings about change, permitting adjustments to be made

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2 This list is compiled from pages 2, 8-10, of Negotiating, Bargaining and Conflict Management, a manual written by Christopher W. Moore, Ph.D., CDR Associates, for the U.S. Army Corps of Engineers. This manual is used as part of a five-day training course presented by the U.S. Army Engineering and Support Center, Huntsville, Alabama.

without threatening the stability of the relationship; 3) conflicts can change the way we think about things, preventing "group-think"; and 4) conflicts helps clarify our purpose, what's important to us or the organization.

The difference is how the conflict is managed. That's one of the key concepts in the Corps' ADR program: one of the key jobs of a manager is to manage conflict so that it does not become dysfunctional. Just turning it over to the attorneys is not a solution. Dispute resolution *is* management.

What is Alternative Dispute Resolution (ADR)?

As the Corps uses the term "alternative dispute resolution," ADR is an effort to arrive at *mutually acceptable decisions*. It's an alternative to adversarial processes such as litigation or administrative processes that result in "win/lose" outcomes. ADR involves structuring the process to minimize the destructive elements and promote productive uses of conflict. It involves the application of theories, procedures, and skills designed to achieve an agreement that is satisfying and acceptable to all parties.

The method ADR uses to achieve a "win/win" solution is *interest-based bargaining*, as distinct from *positional bargaining*, the form of bargaining with which most people are familiar. Here's a comparison of these two approaches:

- **Interest-Based Bargaining**

  Interest-based bargaining involves parties in a collaborative effort to jointly meet each other's needs and satisfy mutual interests.[3] Rather than moving from positions to counter positions to a compromise settlement, negotiators pursue a joint problem-solving approach, identifying interests **prior** to examining specific solutions. After the interests are identified, the negotiators jointly search for a variety of alternatives that might satisfy all interests, rather than argue for any single position. The parties select a solution from among these mutually generated options. In this approach, the emphasis is on cooperation, meeting mutual needs, and the efforts of the parties to expand the bargaining options so that a wiser decision, with more benefits to all, can be achieved.

- **Positional Bargaining**

  Positional bargaining is a negotiation strategy in which a series of **positions** (alternative solutions that meet particular interests or needs), are presented to other parties in an effort to reach agreement.[4] The first or opening position represents the maximum gains hoped for or expected in the negotiations. Each subsequent position demands less of an opponent and results in fewer benefits for the person advocating

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3 This paragraph taken from Christopher W. Moore, Decision Making and Conflict Management, Boulder, Colorado: CDR Associates, 1986. Copyright, 1986, CDR Associates. All rights reserved. Used with permission.

4 Also from Moore, Decision Making and Conflict Management.

it. Agreement is reached when the negotiators' positions converge and they reach an acceptable settlement range.

The difference between interest-based bargaining and positional bargaining is not just procedural. Rather, they reflect fundamentally different attitudes about how to handle disputes, as shown in Figure 1 below:[5]

Attitudes of Interest-Based Bargainers	Attitudes of Positional Bargainers
• Resources are not limited. • All negotiators' interests must be addressed for an agreement to be reached. • Focus on interests not positions. • Parties look for objective or fair standards that all can agree to. • Negotiators believe there are multiple satisfactory solutions. • Negotiators are cooperative problem-solvers rather than opponents. • People and issues are separate. Respect people, baring hard on interests. • Search for win/win solutions.	• Resources are limited. • The other negotiator is an opponent; be hard on him/her. • A win for one means a loss for the other. • The goal is to win as much as possible. • Concessions are a sign of weakness. • There is a right solution -- mine! • Be on the offensive at all times.

Figure 1.

Why worry about reaching mutually-acceptable agreements? The reason is that people act differently when they've participated in a decision and feel they have control over the outcome. For example:

- When people feel that their participation can make a difference in the outcome of a decision-making process, they are more likely to participate seriously and cooperatively.

- When people feel they have some control over the process which generates solutions, they are more likely to be willing to consider and evaluate the alternatives in a serious and responsible manner.

- When people believe that their participation has been genuine, that the process for reaching a decision has been fair, and that all sides had a chance to influence the outcome, they are far more committed to implementing the solutions that have been developed.[6]

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5 See Moore, Decision Making and Conflict Management. See also Roger Fisher and William Ury, Getting to Yes: Negotiating Agreement Without Giving In, New York, NY: Penguin Books, 1981.

6 From Collaborative Problem-Solving for Installation Planning and Decision Making, by C. Mark Dunning, IWR Report 86-R-6, pp. 11-12.

Why The Corps Uses ADR

For the Corps, ADR includes both conflict management and conflict prevention. That is, it uses ADR to resolve disputes that have already occurred, as well as to prevent potential disagreements from turning into disputes. In this sense, ADR is far more than just an alternative to litigation. It's a part of how managers manage.

The Corps, like many large organizations, finds itself involved in numerous disputes. Some of the areas in which disputes occur include:

Construction Claims: As managers of the construction of some of the largest public works projects in the world, the Corps is often involved in claims disputes between the Corps and contractors or sub-contractors, involving interpretations of the contract, differing site conditions, change orders, etc.

Local Cost Sharing: Recent legislation governing public works projects requires greater economic participation of local communities. Thus a part of every new project is the negotiation of a Local Cost-sharing Agreement, which specifies the role which each of the agencies will play in the project. In negotiating Local Cost sharing Agreements, disputes can arise over the proportion of costs to be borne by local government, the design standards of the project, construction schedules, valuation of real estate, or even the accounting methods to be used in assigning cost.

Regulatory Functions: Because of its legislatively-mandated role as the regulator of the nation's wetlands, the Corps must often address disputes over the amount of development in wetlands, what the balance should be between development and protection of wildlife habitat, and what mitigation measures should be required of developers.

Operations: As managers of many of the nation's largest dams and locks, the Corps makes many decisions which are potential sources of dispute, such as the level of flood protection provided, available water supply for communities and industry, navigation rules along the rivers, the water level of reservoirs which are used for recreation as well as flood protection, and so on.

Planning: In planning new facilities, the Corps is often involved in disputes about whether or not a new facility should be built, which alternative is preferable, what mitigation will be provided to people affected by the project, and many other issues.

Military Construction: Even in its military construction role, disputes may arise between the Corps and its "clients" both within the Army and with the other service organizations for whom the Corps provides construction services. There may be different expectations about what is required, different schedules, different ways of operating. All of these may lead to disputes.

Currently, a number of these disputes are resolved through litigation. In the case of the Corps' relationship with its military "clients," disputes aren't resolved by litigation but may result in an impasse that pollutes the relationship between the organizations.

Whether the result is litigation or impasse, there are costs to the organization, and to the tax-paying public. For example, contract claims have more than doubled in the past eight years. Not only has this increased budgets for additional staff and attorneys, but the courts and the Contract Appeals Boards are so jammed that resolution of cases may take years with great costs to both the Corps and the other parties. Even supposedly expedited procedures may take as long as three to four years to produce resolution. There may also be considerable delays in the completion of projects, or cost overruns due to the failure to resolve issues in a timely manner.

When disputes remain unresolved for prolonged periods of time there is damage to important relationships. It does no one any good, for example, when badly needed projects are delayed because of the inability to complete a Local Cost-sharing Agreement. Both contractors and the Corps have a stake in maintaining an effective working relationship, both on current projects and for the future. Disputes over wetland development can sometimes result in the worst outcome, achieving neither environmental protection nor economic development. The Corps can be seen as "the enemy" by communities who depend on river-related facilities.

There are internal costs, as well, when disputes remain unresolved. Studies have shown that 30% of first-line supervisors' time and 25% of all management time is spent on resolving disputes. More than 85% of those leaving jobs do so because of some perceived conflict. Almost 75% of job stress is created by disputes.

Benefits of Using ADR

Managers who want to resolve problems and get things moving find ADR is a valuable tool for taking control and making things happen. ADR is consistent with the "can do" spirit of the Corps.

Some of the benefits of ADR include:[7]

- **Voluntary Nature of the Process:** Parties choose to use ADR procedures because they believe that ADR holds the potential for better settlements than those obtained through litigation or other procedures involving third-party decision makers. No one is coerced into using ADR procedures.

- **Expedited Procedures:** Because ADR procedures are less formal, the parties are able to negotiate how they will be used. This prevents unnecessary delays and expedites the resolution process.

7 Taken from The Executive Seminar on Alternative Dispute Resolution (ADR) Procedures, written by Christopher Moore, Ph.D. of CDR Associates and Jerome Delli Priscoli, Ph.D. of the Institute for Water Resources. This is a two day course for senior level management given by the U.S. Army Engineering and Support Center, Huntsville, Alabama.

- **Non-judicial Decisions:** Decision-making is retained by the parties rather than delegated to a third-party decision maker. This means that the parties have more control over the outcome and there is greater predictability.

- **Control by Managers:** ADR procedures place decisions in the hands of the people who are in the best position to assess the short- and long-term goals of their organization and the potential positive or negative impacts of any particular settlement option. This means decisions are made by those who best know their organization's needs. Third-party decision making often asks a judge, jury, or arbitrator to make a binding decision regarding an issue about which he or she may not be an expert.

- **Confidential Procedure:** ADR procedures can provide for the same level of confidentiality as is commonly found in settlement conferences. Parties can participate in ADR procedures, explore potential settlement options, and still protect their right to present their best case in court at a later date without fear that data divulged in the procedure will be used against them.

- **Greater Flexibility in the Terms of Settlement:** ADR procedures provide an opportunity for the key decision makers from each party to craft customized settlements that can better meet their combined interests than would an imposed settlement by a third party. ADR enables parties to avoid the trap of deciding who is right or who is wrong, and to focus the key decision makers on the development of workable and acceptable solutions. ADR procedures also provide greater flexibility in the parameters of the issues under discussion and the scope of possible settlements. Participants can "expand the pie" by developing settlements that address the underlying causes of the dispute, rather than be constrained by a judicial procedure that is limited to making judgments based on narrow points of law.

- **Savings in Time:** With the significant delays in obtaining court dates, ADR procedures offer expeditious opportunities to resolve disputes without having to spend years in litigation. In many cases, where time is money and where delayed settlements are extremely costly, a resolution developed through the use of an ADR procedure may be the best alternative for a timely resolution.

- **Cost Savings:** ADR procedures are generally less expensive than litigation. The cost of neutrals is typically less than for attorneys. Expenses can be lowered by limiting the costs of discovery, speeding up the time between filing and settlement, and avoiding delay costs. These front-end expenses are often the most costly components of legal costs. These savings are in turn passed on to the taxpayer. Relieving the burden on the courts caused by unnecessary or inappropriate lawsuits can help save valuable public resources.

THE POLICY AND LEGAL MANDATE FOR ADR

The use of ADR is both encouraged by Corps policy and explicitly authorized by Federal law.

One of the strengths of the Corps program has been that it has been sponsored since 1984 by the Corps' Chief Counsel. The ADR program is not intended as a replacement for a legal system. Instead, ADR is a means to "off-load" the pressure on the legal system. Attorneys within the Corps see the need to provide line managers the skills and support so that increasingly disputes are resolved outside of litigation.

This approach has been echoed in an ADR policy statement issued by the Chief of Engineers in August 1990 and reaffirmed in 1993. This policy states that it is the policy of the Corps of Engineers to resolve disputes at the first appropriate management level through negotiation, and where appropriate, Alternative Dispute Resolution techniques. ADR is viewed as a management tool for dealing effectively with conflict while avoiding the expense and delay of adversarial proceedings. In particular, the Chief stresses the use of preventative approaches to dispute resolution.

A further impetus for the Corps program has been the Administrative Dispute Resolution Act 1990 [Public Law 101-552] which specifically authorizes and encourages the use of ADR techniques by federal agencies.[8] In 1991 and 1995, the President issued Executive Orders clarifying some provisions of the Act. Although EO 12988 (February 5, 1996) revokes EO 12788 (October 23, 1991), both encourage the use of dispute resolution techniques. A brief description of the Act and the Executive Orders is provided below:

- **Administrative Dispute Resolution Act, Public Law 101-552, November 15, 1990**

  The Administrative Dispute Resolution Act establishes a statutory framework for federal agency use of ADR. It is premised on Congress' findings that ADR can lead to more creative, efficient, stable, and sensible outcomes. The Act seeks to prod Federal agencies to use ADR methods to enable parties to foster creative, acceptable solutions, and to produce expeditious decisions requiring fewer resources than formal litigation. The legislation aims to broaden agency authority and prompt agencies to use more consensual processes to enhance the possibility of reaching agreements expeditiously, within the confines of agency authority.

  The Act requires that:

  -- an agency appoint a dispute resolution specialist;

  -- an agency review its programs (including entitlement programs, grants, contracts, insurance, loans, guarantees, licensing, inspections, taxes, fees, enforcement, services, economic regulation,

8 At this time, the ADR Act of 1990 has expired under a Sunset provision. However, Congress is considering several bills to continue support for ADR.

management, claims, or other agency or private party complaints) for application of ADR techniques;

-- an agency appoint a senior official to be the dispute resolution specialist of the agency;

-- an agency make training available to its specialist and other employees involved in implementing the Act;

-- an agency with grant or contract functions review its standard contracts for inclusion of ADR clauses.

The Act authorizes parties to administrative proceedings, including agencies, to agree to binding arbitration. But it provides that the arbitration award does not become final and binding on an agency for 30 days. During that 30 days, the agency head has unreviewable authority to vacate the award. In such cases, the agency will assume all attorney fees and expenses of the arbitration process unless an adjudicative office or other designated official of the agency finds that the award of expenses is unjust. After 30 days, the award would become final and enforceable on the agency, and on the other parties with the force of law, although it does not set a legal precedent, nor is it subject to legal appeal except under extraordinary circumstances. The Act recognizes that certain kinds of government decisions will not be suitable for ADR, particularly binding arbitration. In fact, the Corps does not favor binding arbitration, except in labor-management dispute panels, and only if the parties contract for this outcome. Rather, the Corps prefers to have decisions made by the appropriate decision makers. Section 582(b) of the Act delineates the factors that agencies (and reviewing courts) should consider in deciding to use ADR.[9] The Act specifies that an ADR proceeding not be used:

-- if the decision will set an authoritative precedent;

-- if the decision involves a governmental policy that requires additional procedures before a resolution can be made;

-- in a situation where it is important that variations among individual decisions are not increased and the proceeding would not maintain consistent results among individual decisions;

-- if the matter significantly affects persons or organizations that are not party to the dispute;

-- if a full public record is important, and the proceeding cannot provide such a record;

-- if the agency needs to maintain the authority to alter the decision based on changed circumstances, and the ADR proceeding would interfere with that flexibility.

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9 From The Administrative Dispute Resolution Act: Guidance for Agency Dispute Resolution Specialists, Office of the Chairman, the Administrative Conference of the United States, Washington D.C., February 1992.

The Act also authorizes the use of "neutrals" who may act as conciliators, facilitators, or mediators. Such individuals may be government employees or other individuals acceptable to the parties. Before it was disestablished, the Administrative Conference of the United States was directed to establish standards for neutrals, maintain a roster of individuals who meet such standards, and develop procedures to permit agencies to obtain the services of neutrals.

In addition, the Act covers the issue of confidentiality and specifically amends existing legislation.

- **Executive Order 12788, Civil Justice Reform, October 23, 1991**

  This Executive Order encourages voluntary dispute resolution to relieve the American Court system of the number of cases brought before it, given the tremendous growth in civil litigation. It is primarily addressed to lawyers but it is a supporting instrument of the ADR Act of 1990.

  It asks that, where appropriate, counsel should suggest a suitable ADR technique to private parties. Furthermore, it encourages claims to be resolved through informal resolution procedures, such as informal discussions or negotiations, as opposed to litigation or structured ADR processes.

  The Order interprets any ADR technique as binding arbitration "if an agency is bound, without exercise of that agency's discretion, to implement the determination arising from the ADR technique" and seeks to be consistent with the terms for arbitration in the ADR Act of 1990.

- **Executive Order 12988, Civil Justice Reform, February 5, 1996**

  The use of ADR is encouraged rather than formal court proceedings. Resolution of disputes should be expeditious, and ADR may be appropriate if it contributes to prompt, fair, and efficient dispute resolution. Also, litigation counsel should be trained in ADR techniques.

  The EO does not refer to binding arbitration and imposes limitations on the use of binding arbitration, as was done in the prior EO.

In addition, there are other mandates and appeals for the use of ADR in government. The Federal Acquisition Regulation endorses the use of ADR to the "maximum extent" as a matter of policy and advocates the use of neutral third parties to focus on deriving agreements early in the process. Executive Order 12871, "Labor-Management Partnerships," 1994 directs federal agencies to create labor-management partnerships, and to avail consensual methods of dispute resolution and interest-based bargaining and negotiation so as to transform adversarial relationships into a partnership for reinvention and change. The National Performance Review, initiated by President Clinton and Vice-President Gore in 1993, recognizes that transforming labor-management relations will require a significant change in the relationship of the partners. Training in dispute resolution is germane to this objective.

The Department of the Army and the Corps of Engineers actively promote the use of ADR. The Secretary of the Army and the Chief of Engineers have each issued policy statements endorsing the use of ADR (see

Appendix IV for the Corps' ADR policy letter). In fact, the Corps of Engineers was awarded a "Hammer Award" by Vice-President Gore in 1995 for its contributions to government reform through the application of ADR and Partnering techniques. Working groups and dispute resolution specialists have been put in place to facilitate the spread of training and application of dispute resolution principles and methods throughout the Army.

USING ADR

There are certain general principles that underlie the use of ADR. These include:[10]

- **Define the problem, rather than propose solutions or take positions.**

  This step is rooted in three observations about human behavior:

  - *Everybody starts out with a different definition of the problem.* Because of differences in roles, organizational responsibilities, personal values, different information bases, etc., people have very different perceptions of what the problem is. An environmental specialist may view a tree alongside the road as a "visual resource." A timber expert might view the same tree as a "renewable resource," while a traffic safety expert sees it as "a fixed hazardous object." All of these perspectives are accurate but limited by the confines of that individual's role. Whenever you start to address an issue, you must spend time understanding what the problem is as others see it.

  - *People won't accept there is a need for a solution until they accept there is a problem.* No one wants to accept an onerous solution until he or she is first convinced there is a compelling problem that needs to be solved. The expert who sees the tree as a visual resource doesn't have a problem (assuming the tree is healthy) until the other two experts propose to cut it down; one, because it is dangerous to drivers, and the other, because of its economic value. Since the visual expert doesn't have a problem, he or she is very unlikely to accept the need to cut the tree down. Until people buy into a common definition of a problem, they're not willing to talk about solutions that impact them.

  - *The solution first proposed becomes the definition of the problem.* Both the safety expert and the timber expert might propose that the tree be cut down. But in so doing they've not only set off a controversy, they've limited the range of possible solutions. They've defined the problem as "whether or not to cut down the tree." In doing so, they cut out many possible solutions. If, instead, the problem were defined as "how to provide safety to motorists," then the alternatives to cutting down the tree might include safety barriers or a minor relocation of the road. If the problem is "providing sufficient harvestable timber," then there may be solutions that are less visually sensitive than cutting down a tree located right next to the road.

  The central theme that emerges from these observations is the need to define the problem well and get commitment to that problem definition before even beginning to consider solutions. Otherwise, people begin reacting to each others' proposed solutions (positions), and the problem is defined in ways that are not acceptable to all parties and that limit the potential for a mutually acceptable solution.

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10 Many of the principles in this section are taken from Managing Conflict in Public Involvement Settings, prepared for the Bonneville Power Administration by James L. Creighton, Ph.D., Creighton & Creighton, Inc.

- **View the Situation as an Opportunity for Collaboration, Not Competition**

  Look for "win/win" solutions rather than "win/lose" or "winner-take-all" outcomes. Since disputes often come up in competitive situations, where there are perceived or actual incompatible goals or scare resources, it's easy for the emphasis to be placed on competition, rather than on the shared goals and mutually beneficial aspects of the relationship. In fact, competition can easily turn into an adversarial relationship, which at the extreme may involve extremely distorted communication, behavior designed to "get even" with the other side, or even abusive behavior.

  By shifting the emphasis to the fact there are shared goals, it's possible to collaborate, even if some interests are not compatible or are in competition. At their core, all ADR techniques assume a willingness to collaborate, although most techniques assume that the willingness to collaborate will grow as people build increased trust and confidence in each other. But to even initiate ADR, the parties must believe that some collaboration is at least possible, and worth the risk of trying.

- **Negotiate Over Interests, Not Positions**

  While people's interests must be met for them to be satisfied, this doesn't mean that the final solution must correspond with their initial position: this is one way in which ADR differs from traditional negotiation approaches. The traditional form of negotiation, *positional bargaining,* starts out with both sides taking fixed positions, often accompanied by accusations about how the other person's behavior has done the first person damage. Then the parties make a series of reciprocal concessions until they are able to achieve an agreement. Because they start from positions, and then make concessions from them, the best that can occur in positional bargaining is a compromise. That is, the agreement inevitably doesn't meet some of the parties' needs, but meets just enough that the agreement is still tolerable.

  But people's positions are not necessarily the same as their interests. Interests are the fundamental desires and needs that people are trying to meet through negotiation. They are the reasons behind the positions people take. If a union takes the position that a pay-raise must be at least 8%, it is doing so on behalf of such interests as the economic well-being of the workers and the need of the union to be perceived as effective on behalf of the workers. There might be other ways to meet those interests, but the union has chosen the position that an 8% pay-raise is the way to do so.

  That's the point: if you concentrate on interests, there are many ways those interests can be met. If you concentrate on positions, then any concession is perceived as a loss. In addition, the position you pick may be unacceptable to the other party, whereas some other way of meeting your interests completely might be entirely acceptable.

  In interest-based negotiation the parties go through the following steps:

  - Educate each other about fundamental interests

- Jointly identify options that could be mutually beneficial
- Agree on criteria for how to determine when an acceptable solution has been identified

- Jointly create a solution that meets all parties' needs

With interest-based negotiation, the possibility exists that all parties may be able to meet all their needs in the situation -- something considerably better than a compromise -- although these needs may not be met in the ways people expected when they started the process.

- **Employ Effective Communication Skills**

To create the circumstances for collaboration, participants need to employ communication skills that encourage collaboration rather than make others feel defensive or adversarial. In tense situations, most of us resort to accusation, negative characterizations of others' positions, or even personal attacks, in an effort to get our way. The result, of course, is that people dig in more and defend themselves. Also, many people listen just enough to get their own argument ready.

People who are skilled at ADR receive specific training both in listening skills and in communicating feelings and concerns in a way that does not increase defensiveness. Sometimes these skills are brought into the situation by a third-party who helps people communicate more effectively. If people can't listen effectively, the third-party helps them to understand each other's position, and restates accusations in ways that feelings are communicated without putting the other person down or making the situation more adversarial.

- **Design the Process to Address the Type of Conflict**

There are very different types of conflict, and it is important to recognize these different types because very different dispute resolution strategies are needed depending on which type of conflict is involved in your situation. Many conflicts involve more than one of these sources of conflict, so it may be necessary to employ several different strategies, or approach the different types of conflict sequentially.

The five basic sources of conflict are:

Relationship Conflict

This is conflict rooted in poor communication, misperceptions, dueling egos, personality differences, and stereotypes. This kind of conflict produces strong emotions and often must be addressed before people are able to resolve other forms of conflict. Sometimes this kind of conflict is resolved by increased communication or by getting to know each other better. But in polarized situations, increased communication may actually reinforce misperceptions and stereotypes. In such situations, the intervention of a third party is often needed to create an appropriate climate for better communication.

Data Conflict

This conflict results from a lack of important information, or contradictory information or misinformation. It may also involve different views as to which information is important or relevant, different interpretations of the data, or different assessment procedures. In a conflict situation, conflicts over data are sometimes hidden because people may break off communication. They don't even know that they are arguing from a different set of facts. These conflicts are often resolved quickly once communication is reestablished and there is an open exchange of perceptions and information. In other situations the information needed may not exist, or the procedures used by the parties to collect or assess information is not compatible. In this situation, resolution may require that the parties agree on a strategy to get the information they need to resolve the issue.

Values Conflict

Values conflicts occur when people disagree about what is good or bad, right or wrong, just or unjust. While people can live with quite different values systems, values disputes occur when people attempt to force one set of values on others or lay claims to exclusive values systems which do not allow for divergent beliefs. Resolution of values disputes sometimes occurs, at least over time, as people educate each other about the basis for their beliefs. Beliefs about environmental values, for example, have changed considerably over the past two decades, at least in part due to this education process. Values conflicts can also be resolved when people build upon their many shared values, rather than concentrate on their differences. Or, values conflicts may be resolved when the situation is structured so it is not necessary to resolve the differences.

Structural Conflict

Structural conflict means that the situation is set up in such a way that conflict is built in. The "structure" that causes the conflict may be the way that roles and relationships have been defined, unreasonable time constraints, unequal power or authority, unequal control of resources, or geographical or physical constraints. For example, disputes over contracts often occur when organizations define the relationship as a competitive situation in which each side tries to get the best of the deal. If everybody does the best possible job of trying to "protect" his or her organization they may create a situation where all the organizations suffer, yet individuals continue to be rewarded for their efforts to protect. Structural conflicts can be resolved by redefining roles or responsibilities, realigning rewards and punishments, or adjusting the distribution of power or control over resources.

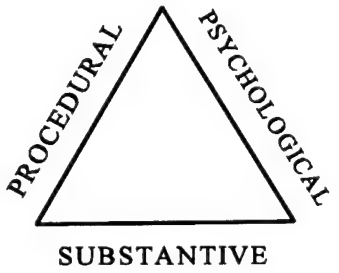
Interest Conflict [11]

Interest-based conflicts occur over substantive issues (money, physical resources, time), procedural issues, (the way the dispute is to be resolved), or psychological issues (perceptions of trust, fairness, desire for participation, respect). For an interest-based dispute to be resolved, all parties must have a significant number of their interests addressed and/or met by the proposed resolution in each of these three areas. Often it's necessary to address data conflict or relationship conflict before addressing interest conflict. But if there are conflicts over interests, the dispute will not be addressed to people's satisfaction until their interests have been addressed.

- **"Satisfaction" Means Meeting a Mix of People's Substantive, Procedural, and Psychological Interests**

Being "satisfied" by a proposed solution means that you are comfortable with the combination of substantive, procedural, or psychological needs that have been met. Substantive interests are your content needs: money, time, goods, or resources. Procedural interests have to do with your needs for specific types of behavior or the "way that something is done." Relationship or psychological interests refer to how one feels, how one is treated or conditions for an ongoing relationship. These interests are shown in the "Satisfaction Triangle" below:[12]

SATISFACTION TRIANGLE



The message of the satisfaction triangle is that the three interests are interdependent. All three must be met -- to a greater or lesser degree -- for there to be "satisfaction." This is why people sometimes refuse solutions that appear to meet their substantive needs if the solution requires them to lose face, or if they have not been treated fairly. Or people may say that while they don't disagree with an

11 For our purposes, "needs" and "interests" are used interchangeably. In the academic literature there are some who argue that "needs" overarch "interests."

12 Christopher W. Moore, Decision Making and Conflict Management, Boulder, Colorado: CDR Associates, 1986. Copyright, 1986, CDR Associates. All rights reserved. Used with permission.

action, they believe that the decision-making process was not good because certain expected procedures were not followed.

Because these three sets of needs are interdependent, there can be "trade-offs" made between them. For example, if someone has been excluded from decision making in the past, she may be satisfied at being included in future decision making (a procedural gain), even though she will just be one of the parties at the table making decisions about the substantive outcome.

The bottom line is that unless people are satisfied that their needs have been met, the problem doesn't go away. Efforts to impose an outcome that doesn't meet these needs are usually unproductive or unstable. People just keep raising the dispute in different forms until their needs get addressed. Force or coercion must be used to impose resolution. This often breeds the use of counter force or behaviors that undermine or subvert trust and cooperation.

If you walk away from a dispute with any person feeling he or she has "lost," you probably don't have a resolution that will last. Either the relationship will be destroyed, or there will continue to be dysfunctional behavior. Thus the goal of ADR is to find solutions that address all parties' needs. When all parties walk away satisfied with the outcome, they all have a stake in making the resolution work and last.

- **Consider a Wide Range of Alternatives**

One of the crucial preconditions to finding a win/win solution is to jointly develop a wide range of alternatives. Otherwise, the first solutions people propose are likely to be thinly disguised positions. By getting all the parties to identify multiple alternatives, they are less likely to stake out and defend any particular solution.

- **Agree on Principles or Criteria by which to Evaluate Alternatives**

Once alternatives have been generated, getting agreement on a single solution often degenerates into a contest of wills. The insurance adjuster may offer you $8,000 to replace your car (destroyed in an accident) and announce "this is as high as we can go." But there is no principle or criterion involved here, just a contest of your will versus the insurance company's. It may or may not be a fair offer. Examples of possible principles or criteria include: "the average of cars of the same age and with the same equipment advertised in the newspaper," or "the average of three estimates from used care dealers," or "retail Kelly Blue Book." Each of these gives an objective basis against which both parties can evaluate the alternatives and decide whether a proposed agreement is "fair." If both accept the same principle or criterion as fair, then both can see that the answer resulting from that principle is also fair.

- **Document the Agreement, to Reduce the Risk of Subsequent Misunderstanding**

  Verbal agreements run the risk of misinterpretation and there can be honest differences in how an agreement is remembered. However, the documentation should be tailored to the complexity of the situation. If you are resolving a contract dispute, the resolution, and its justification, need to be documented as carefully when you use ADR as when you do not. If you are in a less formal situation, documentation might consist of recording all the key points on a flipchart, getting the flipchart sheets typed up, and distributing it for everybody's review. If there's a good level of trust between the parties, one person might take on writing up a summary of the agreement and distributing it for review. But when there's still mistrust, it's better to get agreement on the language while everyone is present. Otherwise there is a danger that a legitimate misunderstanding may be interpreted as an effort to manipulate the process.

- **Agree on the Process by Which Agreements Can Be Revised**

  In some cases the resolution is a single, one-time action (e.g. a payment is made to settle a contractual dispute over costs). However, ADR is also used to create agreements that may guide actions for a period of years. If an agreement governs an ongoing relationship, it is important that one party not unilaterally void an agreement, because when this occurs there are now two problems: the original problem, plus the mistrust and suspicion created when the agreement is broken.

  Yet conditions may change in ways that require organizations to seek adjustments in agreements. Rather than create a situation where people feel the only way out of an agreement is to break it, it's better to include a mechanism for modifying the agreement within the agreement itself. This way, changes in the agreement do not threaten the ongoing relationship. Also, putting mechanisms for change in an agreement often makes it easier to reach the agreement in the first place. Parties who might be afraid of an agreement that locks them in permanently may accept an agreement that includes provisions for modification.

ADR TECHNIQUES

The term "ADR" is an umbrella term that encompasses a wide spectrum of techniques. The techniques vary amongst themselves based on the degree of structure/formality, the kind of involvement of intervenors (such as facilitators or mediators), and the degree of direct involvement of the parties.

Figure 2, below, shows the range of dispute resolution techniques typically used in the Corps of Engineers. Disputes may be resolved directly between the parties, without any outside assistance, through informed discussions or negotiation. These are the "Unassisted Procedures" in Figure 2.

COOPERATIVE DECISION MAKING	THIRD-PARTY ASSISTANCE WITH NEGOTIATIONS OR COOPERATIVE PROBLEM SOLVING			THIRD-PARTY DECISION MAKING		DISPUTE PREVENTION
Parties are Unassisted	**Relationship Building Assistance**	**Procedural Assistance**	**Substantive Assistance**	**Advisory Non-Binding Assistance**	**Binding Assistance**	**Parties are Assisted**
• Conciliation • Information Exchange Meetings • Cooperative/ Collaborative Problem-Solving • Negotiations	• Counseling/ Therapy • Conciliation • Team Building • Informal Social Activities	• Coaching/ Process Consultation • Training • Facilitation • Mediation	• Mini-Trial • Technical Advisory Boards/ Disputes Panels • Advisory Mediation • Fact Finding • Settlement Conference	• Non-Binding Arbitration • Summary Jury Trial	• Binding Arbitration • Med-Arb • Mediation-then-Arbitration • Disputes Panels (binding) • Private Courts/Judging	• Partnering

Figure 2 - A Continuum of Alternative Dispute Resolution Techniques

When unassisted approaches no longer prove effective, then a third party may be called in to assist the parties in reaching agreement, i.e. "third-party assisted" techniques. Some of these techniques involve assistance with the "process" -- helping people communicate better, setting up a structure the parties perceive as fair, suggesting procedures that might lead to resolution. Other techniques involve assistance in determining what would be an equitable settlement. All "third-party assisted" techniques leave the decision making authority in the hands of the parties. Settlement is reached by mutual agreement. When settlement cannot be reached in this manner, then resolution can only occur through "third-party decision making," e.g. in an administrative hearing or courtroom. Finally, some ADR techniques are designed to be "preventative" by improving communication and by providing mechanisms for discussing disagreements before they turn into full-blown disputes.

Except for binding arbitration, all the ADR processes utilize *interest-based bargaining*. This approach encourages parties to look for mutual gain whenever possible, and follows principles and procedures designed to achieve mutual agreements.

A more detailed discussion of individual ADR techniques is provided below. Sometimes techniques can be combined (see Appendix II).

Unassisted Procedures

In the vast majority of disputes, people work out a resolution without assistance. At the simplest level, two people get together, discuss the issue, and work out the problem.

But that doesn't always work. In fact, sometimes such discussions end up with both people polarized and convinced that the other person is unfair and unreasonable. At this point, something more structured may be needed. The two techniques used more frequently in the Corps are Information Exchange Meetings and Interest-Based Negotiation.

Information Exchange Meetings

Information exchange meetings are meetings in which parties share data and check out perceptions of each other's issues, interests, positions, and motivations in an effort to minimize unnecessary conflicts over the facts of the case. Typically these meetings are set up with the understanding that no formal effort will be made to reach an agreement during the meeting. This takes the pressure off people so they feel more open and comfortable. Information exchange meetings are often the first step toward productive problem solving or negotiations.

Interest-Based Negotiation

Although the principles of interest-based negotiation underlie all ADR techniques, interest-based negotiation is also a set of procedures that can be followed by parties to reach a mutual agreement. Although the procedures may be different from traditional positional bargaining, this is still a formal negotiation process between participants who have the authority to make commitments on behalf of their organizations.

Third Party Assistance

Most ADR techniques involve the assistance of a neutral third party, usually someone who is skilled in encouraging resolution of disputes. The third party might not be a technical expert in the subject matter of the dispute, but someone skilled in creating a process that contributes to resolution. Instead of influencing what the resolution will be, the third party concentrates on structuring how the parties work together, knowing that how people work together can significantly affect whether or not they reach an agreement. Other ADR processes use third parties as technical experts, calling on them to provide neutral counsel to all parties on substantive issues. In other words, techniques range from those that provide *process* assistance to those that provide counsel on what constitutes an equitable *substantive outcome*. The major third party assistance techniques are shown below, beginning with those that concentrate on process, then moving to those with increasing involvement of the third party in the substance of the decision.

Facilitation

Facilitation involves the assistance of an individual who is impartial towards the issues or topics under discussion in the design and conduct of problem-solving meetings. A facilitated meeting has the feel and structure of a business meeting, working on an agenda that has been jointly created by the parties. A facilitator will make sure that all parties feel listened to, will make sure that the meeting stays on track, and may suggest procedures which are helpful in arriving at a solution. Typically the facilitator is granted considerable influence over *how* the meeting is run, but is not permitted to influence the substance of the decisions reached. Facilitators often support **collaborative problem solving**.

Mediation

Mediation can be described as an interest-based negotiation under the guidance of a third-party. The parties choose an intervenor to "guide" them in designing a process and reaching agreement on a mutually acceptable solution. Although the mediator makes recommendations about the process, the parties themselves make the important decisions about the problem-solving process and the outcome. The presence of the mediator creates a "safe" environment for the parties to share information, address underlying problems, and vent emotions. A successful mediation can give the parties the confidence in themselves, each other, and consensual processes to negotiate without a third party in the future.

Fact-Finding

Fact-finding can be used in scientific, technical or business disputes in which knowledge is highly specialized. A third-party subject-matter expert is chosen by the parties to act as a fact-finder or independent investigator. The expert then submits a report or presents the findings at a mini-trial, arbitration proceeding, or for whatever process has been designated. The emphasis is on determining the facts or legal issues pertinent to the dispute and is most often used in the early stages of a conflict. Fact-finding can, however, be implemented in a process whenever facts or points of law cannot be agreed upon. After the report or testimony, parties may negotiate, use further proceedings, or conduct more research.

Mini-Trial

The mini-trial isn't really a trial. In fact, the mini-trial is a structured form of negotiated settlement. But a key element of the mini-trial, which in the Corps is called the "mini-trial conference," looks much like an abbreviated trial. Attorneys or other representatives for the two parties each have a specified period of time, ranging from a few hours to a day, to present their "case" in front of representatives of senior management from the parties to the dispute. Once the cases are presented, however, the management representatives, instead of trying to reach a judicial decision, negotiate a mutual agreement. The management representatives are assisted in their negotiating efforts by a "neutral advisor." The exact role of the neutral advisor is determined by the parties' representatives. The neutral advisor might simply act like a facilitator or might be a technical expert who can provide objective analysis of the technical or legal merits of the cases presented.

Disputes Review Board or Disputes Panel

This technique is particularly suitable for resolution of claims involved with large construction projects. One of the barriers to resolving disputes is that the parties lose their objectivity about the merits of their position. The idea of a disputes review board is to provide the parties with an objective evaluation of the dispute by fully qualified technical experts. A disputes review board or disputes panel is established at the beginning of the contract. The Corps and the contractor both appoint a qualified technical expert to sit on the board, and these two technical experts in turn select a third member of the board who is acceptable to both parties. As disputes arise, they are presented to the board. The opinion of the board is advisory, with the parties negotiating a final resolution. Normally opinions of the disputes review board are extremely influential and helpful in resolving the dispute in a timely manner.

Non-Binding Arbitration

In non-binding arbitration, the parties present their sides of the dispute to a neutral arbitrator who recommends a basis for settlement. The parties are then free to accept or reject that recommendation. The arbitrator is often an attorney, a judge, or a technical expert in the subject matter of the dispute, selected by agreement of the parties because he/she is believed to be impartial, objective, or knowledgeable. Arbitration hearings differ in their degree of formality. Some hearings are relatively informal, permitting interaction between the parties. Other hearings are quasi-judicial, with opportunities for cross-examination and closing statements. The arbitrator may also conduct additional research to validate the claims made.

In non-binding arbitration the arbitrator issues an opinion on the merits and appropriate forms of resolution, but this opinion is advisory. It's still up to the parties to negotiate an agreement. However, because the arbitrator is both neutral and qualified to review the technical merits of the case, the arbitrator's opinion is often extremely influential and can push the parties closer to an agreement.

Third-Party Decision Making

ADR techniques are primarily an alternative to third-party decision making. Of the three third-party decision-making processes shown in Figure 2 -- binding arbitration, administrative hearings, and litigation -- only binding arbitration is normally considered an ADR technique because it was selected through collaboration. By pre-agreement of all parties, the arbitrator renders a binding decision.

Dispute Prevention

Disputes are a bit like a grass fire: relatively easy to take care of while they're still small, very hard to put out once they've grown. As a result, the best approach is often prevention, rather than trying to achieve resolution after there is a full-blown dispute. Typically, dispute prevention involves improving communication, building stronger personal relationships with people with whom disputes could occur, and establishing procedures for addressing issues before they become disputes. Partnering is the most frequently used dispute prevention technique in the Corps.

Partnering

Partnering is a dispute prevention technique that has been used primarily during contract performance. Its primary goal is to change the traditional adversarial relationship to a more cooperative, team-based approach. The contract is awarded on the usual competitive basis, but after the contract is awarded the contractor is invited to participate in Partnering. Once an agreement is reached, representatives of all the key parties to the contract go through a joint process to help define common goals, improve communication, and foster a problem-solving attitude among the people who must work together on the contract. Participants come to understand and appreciate the roles and responsibilities each will have in carrying out the project. Often the teams identify cost or quality goals and work together to achieve them, sharing in the benefits when they are accomplished. There may also be agreement on ADR processes to be used when issues cannot be resolved by first-level managers.

Partnering usually involves a series of meetings, beginning with a session that lasts several days to a week, with regular quarterly "tune-up" meetings among the parties. It also normally involves the use of a facilitator or facilitator team.

A further comparison of the different processes and their potential applications is provided in Figure 3 on the following pages.

ARBITRATION	DISPUTES REVIEW BOARD (DRB)
Definition Third party neutral or panel with expertise makes decision after hearing arguments and reviewing evidence. Characteristics Can be binding or non-binding. Highly structured, but less formal than adjudication. Counsel for each party presents proofs and arguments. Parties select third party(ies) and set rules. Parties can select norms to apply, i.e., a particular body of law or regulation. For small number of parties. Application When prompt decision needed, can be used at various stages. Good for mixed questions of law and fact when decision based on a general standard is needed. Used when there is a high level of conflict and, often, when no future close relationship is foreseen.	Definition Establishes forum that fosters cooperation between owner and contractor. Neutral experts offer informed finding for decision by the parties. Set in place at beginning of project before disputes arise. Characteristics Neutrals form panel of 3 technical experts. Disputes, delays and resolution costs are minimized. Disputes addressed as they arise. Ongoing during life of project. Application Good when there can be substantial money claims and for complex, ongoing projects. For disputes over technical data.

Figure 3 - Comparison of ADR Processes

FACILITATION	FACT FINDING
Definition Information exchange and generation of options with assistance of a third party skilled in meeting leadership. Low level to medium level of conflict. Characteristics For 3 or more parties, who follow an agenda. Has the feel and structure of business meeting. Can be conducted by or without a neutral. Facilitator may not influence decision, but can have influence over how session is conducted. Application For definition of problems and goals, and to identify personal and institutional support. Can be preliminary step to identify a dispute resolution process.	Definition Third party subject matter expert selected by parties to act as fact finder and independent investigator. Characteristics Can identify areas for agreement or disagreement. After report, parties may negotiate, use further proceedings, or conduct more research. Expert submits report and can offer evaluation, if requested. Application Can be used during dispute resolution process whenever necessary, although often used in initial stage. For disputes where is seemingly contradictory data or not enough data. For technical or factual disputes.

Figure 3 (Cont.) - Comparison of ADR Processes

MEDIATION	MINI-TRIAL
Definition Parties select third-party neutral to help them design and to guide them through a process to reach a mutually acceptable solution. Characteristics Parties make decision. Parties share information and address underlying problems in presence of mediator. Allows parties to vent emotions. Can be basis for parties to negotiate in the future without a third party. Application Especially good when parties will have ongoing relationship. Useful when negotiations have reached an impasse and one party feels injured or ignored.	Definition Structured settlement process during which authorized representatives hear case and negotiate an agreement. Characteristics Parties select neutral and make rules for procedure. Parties can present summary proofs and arguments. Neutral can advise, mediate or make advisory opinion. Party representatives, with authority to settle, negotiate after hearing the presentations. Can be used in various stages of dispute. Application For use in disputes over technical data or for questions with a mixture of law and fact. For a small number of parties when prompt decision is needed.

Figure 3 (Cont.) - Comparison of ADR Processes

NEGOTIATION	PARTNERING
Definition Parties attempt to resolve differences by compromise or using interest-based principles without a third party. Characteristics Unstructured process without formal rules or agenda. For low-level conflict, more casual and informal than other processes. Can be in the home or office of one of parties. Application Often the first step toward resolving a conflict. When issues are clearly defined and there are enough issues for give-and-take. For nontechnical disputes when no question of law. When history of relationship among parties has been good or when a relationship is being created.	Definition Two or more parties, engaged in enterprise requiring interdependence, work to create a working relationship conducive to trust, mutual understanding and the pursuit of mutually acceptable goals. Parties make agreement that in principle commits each to sharing risks involved in completing projects and promoting cooperation. Characteristics Takes place before start of project. Voluntary, relationship-building experience focuses on interests. Seeks to address problems before they become disputes. Partnering agreement can stipulate an ADR process, often a DRB. Application Initially used on heavy construction projects. Good for preventing conflicts. Good when there will be future relationship or for long, ongoing projects.

Figure 3 (Cont.) - Comparison of ADR Processes

CHOOSING AN ADR TECHNIQUE

Deciding to use ADR is a two-step process. The first step is to decide if your situation is appropriate for alternative dispute resolution. The second step is to decide which ADR process is most appropriate.

Is ADR A Good Choice?

Below are some questions designed to help you take into account the crucial factors in deciding if ADR is suitable for a particular dispute. You might want to answer these question jointly with your legal counsel.

The weight given to each of the following questions will depend on the individual dispute and the decision-makers. However: a negative response to the first five questions is critical because a negative response to these questions says there could be a problem with enforcing an agreement worked out as the result of using an ADR procedure.

- *Are there persons with authority available to represent your party?*

  There needs to be a person available with knowledge of the issues and with authority to effect a decision. It is sometimes difficult, especially in a public policy dispute to identify the authoritative person. You may want to hold off on going ahead with a process until that person has been identified and available. The agreement will be ineffective if a person without authority signs an agreement. Or a potential resolution can fall apart if at the moment of agreement someone says "I have to check with headquarters first."

- *Can this issue be resolved without involving other overarching disputes that could develop in the foreseeable future, nullifying any decision on this one?*

  Resolving a small issue that is dependent upon the outcome of an overarching one is no resolution at all. You must get to the root of the dispute, or your efforts may have been in vain. For instance, a decision among the Corps, local authorities, and State officials might be meaningless if there is a larger dispute between the Corps and other Federal agencies that would not permit that decision to be implemented.

- *Can you resolve this dispute without the need to set a precedent, or do you want an all-or-nothing decision?*

  With your legal counsel, review the regulations and statutes that may affect a decision, or be affected by it. There are disputes where the Corps would like to see a legal precedent established. If so, you need to have the decision made by a judge (whether administrative or civil). In other cases, the law is well defined, and the dispute turns on questions of fact and interpretation. These are more appropriate for ADR.

- *Do you believe it will be possible to "enforce" the contract; that is, are the mechanisms in place to ensure that all parties will abide by the terms of the agreement?*

  A process that results in an unenforceable decision wastes time and money. A decision may be unenforceable because of legal considerations, financial considerations, or lack of real commitment.

- *Can the dispute be resolved without endangering the parties' need for confidentiality?*

  Since ADR is a voluntary process, there's no guarantee it will resolve the issue. People may be concerned that by engaging in ADR they are making information available that could be used against them if the issue ultimately comes before a judge. Normally the participants in an ADR process make an agreement to protect confidentiality in the event the ADR process doesn't result in resolution. But keep in mind that a court can order disclosure of information or testimony from a process to prevent a gross injustice or to prevent violation of the law if one of those considerations outweighs the integrity of the ADR process.

While the five questions above raise issues that could prove to be "fatal-flaws," there are other issues that are important to the success of an ADR process including:

- *Is there an imbalance of power? Can you overcome it?*

  Voluntary agreements are more likely to be reached when the power of the parties is approximately equal. Otherwise people fear they may be negotiating at a disadvantage or will be unable to get the other party to comply with the terms of any agreement.

  Sometimes the power of the parties is dissimilar but there is some external force -- such as a judge, a powerful political figure, a coalition of interested parties, or even a circumstance -- that serves to equalize the power.

  Power is relative, and there are many types of power. Types of power include legal power, personal or party credibility, political power, resources, sanctions, nuisance power, or procedural power.[13] Can you balance the power of the other party? Be realistic, but don't let the obvious power of the other party intimidate you. Look carefully for hidden assets.

- *Do you need to maintain a long-term relationship with the other party or parties?*

  Judges often make decisions that resolve the issue but destroy the relationship between the parties. Because ADR results in agreements acceptable to both parties, ADR can contribute to maintaining an ongoing relationship with the other parties. If you don't care about any future relationship -- and there aren't other reasons for using ADR -- ADR may not be applicable.

13 Moore and Delli Priscoli, Executive Seminar, pp. 92-93.

- *Are the other parties committed to using a consensual process?*

  Lack of firm commitment by one of the parties can keep an otherwise effective ADR process from working. People sense the lack of commitment, and this lowers trust and delays progress. Hardened positions can be a sign of resistance to a consensual process.

- *Is there a high level of trust and respect among the parties?*

  Mutual trust and respect among the parties enhances the chances of resolving the dispute using an ADR forum. If people trust each other, communication is more open and the chances of resolution are higher. Also, if there is trust, there is less need to find guarantees to ensure that the other person will keep the agreement.

- *Can you identify the major issues?*

  A dispute -- particularly a public policy dispute -- may not have matured or developed to the point where the issues are well defined. If this is true, the parties may not be ready to negotiate, or unrecognized issues can surface later, disrupting the process.

- *Is it important to act quickly to prevent escalation?*

  Sometimes, the longer an issue goes on, the more polarized it gets. It may be wise to intervene with an ADR process as soon as possible. An adjudicative process usually takes longer to complete and can fuel the tension and lead to hardening of positions.

- *Are the issues politically sensitive or controversial?*

  Issues that are likely to be high profile or political hot potatoes need to be examined closely to determine whether ADR is suitable for resolution. In such cases the "public's right to know" may be the strongest value. But this may be at odds with the privacy that is an important element in ADR proceedings. For the public to be satisfied that no "secret deals" were cut, an adjudicative process may be necessary.

- *Will a consensual process have a positive effect on staff morale?*

  Sometimes staff feel that an ADR process results in a sell-out. It's bad enough if a judge rules against them. But if Corps management voluntarily agrees that the other parties had some legitimacy to their complaints, it may be seen as under-cutting staff. On the other hand, of course, Corps management has a responsibility to do what's good for the organization as a whole, even if some staff are offended. Balancing potential morale problems with the risks of proceeding with litigation is always an individual decision, dependent on the circumstances of a particular dispute. Experience shows that both education about ADR, and involving staff in the decision whether to use ADR, may be reassuring and result in staff support for an ADR process.

- *Is ADR likely to be cost effective?*

  It's unlikely that you would use an ADR technique if you weren't satisfied that it was cheaper, or at least as cheap as litigation or whatever other mechanisms exist for resolving the dispute. With litigation, for example, there are costs associated with lawyers, time delays, etc. But there are still costs associated with ADR techniques (in both time and money), with some techniques being more expensive than others. So assess the relative costs of the ADR techniques, and how those compare with your other options. Keep in mind, however, that even if the costs are nearly equal, ADR may still do a better job of maintaining the relationship with the other party than a winner-takes-all court decision. While it may not be possible to put a price on that relationship, it is still an important value to consider.

- *Are you willing to accept the level of liability or risk associated with litigation?*

  Unless you have an airtight case, litigation -- when the level of liability is very high -- can be a high-stakes gamble. An assessment has to be made whether the chance of winning 100% is worth the chance of losing 100%. There may be conditions under which this is the case. But often the outcome is not obvious or is problematic. In these cases, ADR -- because the issue is resolved only when the parties reach an agreement -- gives you greater control over the outcome, and puts limits on the level of liability.

- *Is there organizational pressure to reach a settlement?*

  On some occasions there may be organizational pressure to resolve the dispute more rapidly than would be possible through litigation. Ordinarily, for ADR to work, all parties must feel some urgency or desire to reach a timely settlement. Once the desire to reach a settlement is present, ADR techniques permit you to establish a mutually acceptable time-table for settlement.

Which Technique Should I Use?

Selecting the right ADR technique is hardly a science. In fact, you are encouraged to produce hybrids or variations on techniques if you are convinced they'll do a better job of solving your problem. However, there are some basic considerations that help discriminate between techniques:

- *Are you trying to prevent disputes, or resolve a dispute that already exists?*

  If you are designing a preventative approach you would want to consider partnering or a disputes review panel. Partnering, described above, includes the use of a facilitator. A disputes review panel, also described above, involves the use of neutral subject-matter experts.

- *Are key parties willing to meet?*

  If the key parties are willing to meet, you may be able to proceed with direct negotiations. If not, or if things are highly polarized, you probably need some form of third-party assistance. Depending on some of your answers to subsequent questions, you might consider techniques such as facilitation, mini-trial, mediation, or non-binding arbitration.

- *Are the technical and legal resources of the parties balanced?*

  Negotiation works best when the technical and legal resources of the parties are balanced. If they are not balanced, you may need third-party assistance. A facilitator or mediator may create greater balance between the parties, or know how to use the resources of the parties so they serve the whole process, not just the interests of one party.

- *Are there few or many parties or issues?*

  If there are a number of parties, or a number of issues, it gets harder to use either a mini-trial or non-binding arbitration. These processes can become cumbersome and time-consuming unless they are focused on a few issues. When there are numerous issues, or a lot of people involved with the issues, either facilitation or mediation may be helpful.

- *Are the key parties antagonistic?*

  If the key parties are antagonistic, then third-party assistance is virtually required. If things are badly polarized, you may need a mediator to work with the parties individually before they ever come together.

- *Which is more important: timeliness and minimal cost, or control over the procedures and outcome?*

  If your priority is to get quick resolution, at lowest cost, then either a mini-trial or non-binding arbitration may be your approach. With a mini-trial you still maintain control over the outcome and process, but there is certainly pressure to settle. In non-binding arbitration you are not required to accept the proposed settlement, but a climate may exist where it's hard for you not to accept it.

  Both facilitation and mediation are potentially more time-consuming, but nobody feels that the process was imposed on them, or that they were pressured to reach a particular outcome.

- *Is the outcome of the dispute of great concern to senior managers?*

  Some techniques, such as a mini-trial, involve a considerable commitment of time from senior management. As a result, a mini-trial is possible only if senior management is willing to commit the time to participate, either because of the dollar value of the claim or the issues involved. The same point applies if you are going to involve senior managers in direct negotiation.

If the alternative is litigation, however, a mini-trial may be a very worthwhile investment. Senior management may be required to spend as much or more time preparing for litigation, with less control over the outcome.

Appendix I provides some examples of how the Corps has used various ADR techniques.

CONCLUSION

ADR is a relatively new and rapidly changing field. It holds considerable promise for Corps managers because it puts control of the process and timing of dispute resolution back in the hands of line managers, who possess greater flexibility in resolving disputes than exists in litigation. New ADR techniques continue to be developed, and many variations in format are being tried for existing techniques.

The Corps experience with ADR can best be summarized by testimony by Lester Edelman, Chief Counsel of the Corps, before the Committee on the Judiciary, Subcommittee on Courts and Administrative Practice, United States Senate, May 25, 1988:

> "Some of the more significant lessons from our experience indicate that ADR can bring the resolution of issues closer to factual realities because ADR encourages those closest and most knowledgeable in the technical aspects to work out agreements directly. Moreover, ADR permits the decision makers to make the decision, rather than have them made by third parties. ADR can decrease the load on the litigation system by ensuring that only major precedent-setting claims go the full litigation route. Lastly, ADR can re-establish trust between government and industry.... If we're serious about making a dent in litigation now and in the future, ADR is available. With ADR, the future is now."

APPENDIX I - HOW ADR HAS BEEN USED IN THE CORPS

Here are examples of how the ADR techniques described in this pamphlet have been used by the Corps:

Sanibel Island General Permit (Collaborative Problem Solving and Facilitation)

The Corps is given the responsibility, by law, to regulate the nation's wetlands, issuing permits for appropriate development in wetlands areas. In parts of Florida, most development takes place in wetlands areas, and the Corps is responsible for reviewing hundreds of permit applications. Sanibel Island is no exception. A famed resort area, Sanibel Island is characterized by a local community very concerned about protecting the environment and the aesthetic character of the island, coupled with substantial pressures for development.

Rather than issue numerous individual permits, the District Engineer decided to issue a general permit setting out the conditions under which permits would be granted. Any applications which complied with these conditions would be granted a permit without having to meet additional procedural requirements.

But rather than establish the conditions himself, the District Engineer convened a group representing all the key interests in the community, including local government, developers, and environmental groups. The District Engineer described his reasons for deciding to issue a general permit, but stated that if this group could reach agreement on the terms of the permit, he would accept those terms as his own, including them in the general permit. He provided the group with several facilitators, as well as technical support staff, maps, and information.

Over a period of several months the group was able to hammer out the terms of a general permit, which the District Engineer did include in a general permit governing Sanibel Island. Over the four-year term of the general permit, several hundred permits were granted on Sanibel Island, but no protests were filed for any of these permits during the life of the general permit.

Bonneville Navlock Diaphragm Wall (Partnering)

The Bonneville Navlock Diaphragm Wall contract was awarded to S.J. Groves and Sons Construction in early 1989. The project was being built in an area of slide activity and unknown underground geology. The complexity of the job, the risks of unknown geology, and the intricacies of scheduling made Corps managers realize that effective management would be the key to the success of the project. With this in mind, the Corps approached Groves with the idea of Partnering within days of the award of the contract. Groves enthusiastically endorsed the Partnering concept and helped arrange the Partnering workshop. Several key managers from both organizations attended a training course together, during which they developed a personal working relationship while planning the Partnering structure.

The Partnering workshop was attended by key people who were stakeholders in the success of the project: designers, engineers, managers, attorneys, superintendents, key subcontractors, and suppliers. Following teambuilding activities, participants developed a mission statement and a set of objectives for the project. An implementation plan was also established at the workshop.

The Corps and contractors jointly evaluated progress during quarterly meetings, using joint evaluation forms developed during the Partnering workshop.

The project is now completed. Below is a comparison of the original objectives and the actual outcomes:

WORKSHOP OBJECTIVES	FINAL OUTCOMES
Complete the project without need for litigation.	There were no outstanding claims or litigation.
Value engineering savings of $1 million.	Value engineering savings of $1.8 million.
Control cost growth to less than 2%.	Controllable cost growth was held to 3.8%.
Finish the project 60 days ahead of schedule.	The project was completed on schedule.
Suffer no lost time from injuries.	No lost time injuries were suffered.

In addition to the accomplishments above, there was a two-thirds reduction in letters and case-building paperwork, compared to comparable projects.

While not all the original objectives were met, the performance was considered outstanding when compared with other projects. For example, on another project where Partnering was not used, value engineering savings was only $750,000 on a $310 million contract, compared to $1.8 million out of $34 million on the Groves contract. The typical cost growth is 10%, compared with 3.8% on this project. While no lost-time injuries were experienced on this project, the industry-wide accident rate is 6.9%.

The Portland Chief of Construction concluded that Partnering was not only cost-effective but resulted in significant improvements in morale and effectiveness of execution.

Truman Dam (Mediation)

The dispute at Truman Dam involved the manner in which the reservoir at Truman Dam was being operated. The Truman Dam has recently been fitted with additional hydroelectric generators, and the Corps proposed to operate the dam for full use of the new facilities. This was strongly opposed by homeowners around the lake, who objected that large draw-downs of the reservoir would make the

lake less usable for recreation and would be an eye-sore. State conservation officials were also concerned about the impact upon fisheries. The Governor of Missouri became active in opposing the Corps plan.

A mediator was retained, and during the first two sessions the parties were able to agree upon an interim operating agreement. They then turned their attention to a long-term operating plan. During the third mediated session, agreements were reached which governed the level at which the reservoir would be maintained, operation of the reservoir during recreation months, operations during fish spawning periods, and permissible releases during power emergencies. However, no agreement was reached on when, and if, the full generating capacity could be used. The Governor was not present at the negotiation session, and there were differing interpretations as to whether he would accept full generation.

After the third session, the mediator felt that the parties needed additional time to assess the merits of their cases, but, in an effort to keep the process moving, the mediator prepared a "single-text" negotiating document which laid out some of the options under consideration. The purpose of a single-text negotiation is to lay out a potential agreement showing possible concessions from all sides, without the parties having to risk making the concessions unilaterally.

The single-text document did serve to get the sides thinking about different options. Also, the representative of hydropower interests met with the Governor and informed him that although considerable progress had been made, if there was no willingness to consider at least five hydropower units, the negotiations would fall apart. The Governor directed his staff to return to the table to determine whether some arrangements could be worked out that would allow for at least five-unit generation. After some discussion, it appeared that something could be worked out, if hydropower interests would drop any future claims to a sixth unit.

The final agreement, reached in a final negotiating session, provided for a three-month window during which five units could be operated. Subsequent public meetings showed that the public was no longer interested in the issue -- only three people showed up. The agreement was sent to Washington D.C. for final approval, but unfortunately, due to delays, the first year's three-month window of five-unit operation was lost. However, the power interests were pleased that they would have secure generation and marketing capacity in the future.

PGA - Litchfield Superfund Site (Mini-Trial)

In 1983, the U.S. Environmental Protection Agency (EPA) placed the PGA/Litchfield site on the Superfund National Priority List. Subsequently EPA concluded that the contamination resulted from solvents which had been used and disposed of on-site by the U.S. Navy and the Goodyear Corporation, both of whom operated facilities on the site during World War II. The Corps became involved when it was designated to represent the Department of Defense in the dispute.

The primary issue of dispute was the percentage of clean-up costs which would be borne by Goodyear versus the Department of Defense. Each felt it had strong arguments for why the other should bear the majority of the costs. After considerable discussion, and under pressure of EPA deadlines, the parties finally agreed to employ a mini-trial as the way to resolve the issue. A mini-trial agreement (an agreement specifying the exact procedures to be used during the mini-trial) was developed by the Corps' attorneys and Goodyear's attorneys, and approved by the senior management representatives designated by both organizations. A neutral advisor was also selected. Because both senior management representatives felt fully competent with the technical issues, they selected a neutral advisor primarily possessing facilitation/mediation skills.

Each organization had a half-day to present its case. Following this, the other organization had a chance to respond to the presentation, and there was a question and answer period directed by the management representatives. The presentation was concluded with each organization having 30 minutes to present a summary of its case. Then the management representatives adjourned to discuss possible agreements.

Negotiations took place for a full day, including a trip to the actual site by the management representatives and the neutral advisor. In the evening, both negotiators met again with their own staff. On the next day, the Corps representative "took a walk" with the neutral advisor and tested some possible percentages. Similarly, the Goodyear representative also "took a walk" with the advisor and also tried out some figures. Since the numbers seemed to be close, the negotiations resumed, and in the course of the day an agreement was reached. The final agreement allocated the costs 1/3 to the Department of Defense and 2/3rds to Goodyear.

Subsequent interviews show that all parties to the dispute -- the Corps, Goodyear, and EPA -- were generally satisfied with both the mini-trial as a procedure and the outcome itself.

San Antonio Tunnel (Disputes Review Board)

A Disputes Review Board was established for the San Antonio Tunnel Project. There were three members of the Board, none of whom are employees of either the Corps or the contractor. The Corps appointed one member, the contractor appointed one, and the third member was selected by agreement of the first two members.

The procedure established is as follows: (1) If the contractor objected to a request or order, he requested a written decision or order from the Corps; (2) If the contractor still objected, he filed a written protest within 30 days of the written order and requested Board review; (3) Both the contractor and the Board were able to appear at the Board and present their case; (4) The Board would issue a recommendation within 30 days from the hearing; (5) Within 30 days from receiving the Board's recommendation, both parties had to notify the other whether the dispute was resolved or remained unresolved. A procedure was established by which a presentation could be made to only one Board member (the third member who was selected by the two members selected by the Corps and contractor). This streamlined the timing of the hearing process.

In effect, the Disputes Review Board is a form of non-binding arbitration. Instead of a single arbitrator, there is a panel of technical experts. The parties can choose whether or not to accept the Board's recommendation, although normally the Board's recommendation will carry considerable weight.

The Board decided that the procedures at the hearings should be quite informal, although procedures could be changed on a case-by-case basis. The Board believed that the informal atmosphere would be more conducive to problem solving. The Board recommended that they not try to assess dollar amounts. Rather they tried to assess the merits of each case, i.e. who is entitled to what, and let the organizations determine the dollar amounts associated with those entitlements. This rule could be reassessed in special circumstances.

The Board has heard two disputes. The first dispute involved a height limitation for shaft lining, with the Corps arguing that a 5-foot limit contained in a contract specification applied to all excavation. The contractor argued that the height limitation applied only in certain soil conditions. The Board reviewed both the contract and normal industry practice, and recommended that the contractor's interpretation was reasonable.

In a second dispute, the Corps Resident Engineer ordered that work be stopped on excavation of one portion of the tunnel until the contractor submitted a report describing proposed work methods, as required by the contract. The contractor argued that the additional excavation was a repeat of previous work and covered by previous reports. The Board concluded that, although the excavation was minor, it was sufficiently unique that different methods would be required, and found the Corps' interpretation to be reasonable.

In both cases, the recommendation of the Board was accepted by the parties.

The Dalles Lock & Dam Fish Ladder (Non-Binding Arbitration)

Unlike the San Antonio Tunnel Case, where disputes are resolved as they come up, the Dalles Lock and Dam Fish Ladder case involved an unresolved dispute on an already-completed project. The contractor filed a claim stating that the site conditions differed substantially from those specified in the Request for Proposal, resulting in increased costs.

This project involved the reconstruction of an existing fish ladder. The reconstruction work had to be done during the winter because the fish ladder was in use at all other times. To do the work, the contractor had to keep the work area dry. Three bulkhead gates were expected to seal the area from water. However, an imperfect seal was obtained on one of the bulkhead gates, and water leaked onto the site. Sealing the bulkheads was done by the contractor, but under the supervision of a Corps employee. In addition, the contractors needed to maintain low water levels in a junction pool, but when a major leak occurred, divers were sent down and discovered that the Corps had failed to properly close a valve. To compound the problems, there was a spell of freezing temperatures, making it very difficult to de-water the site.

The Corps acknowledged the problems created by the opened valve, but was unable to get agreement on the damages resulting from it. However, the major claim was based on the failure of the gate to provide a water-tight seal. The Corps maintained that under the contract it was the contractor's responsibility to lower the gates and assure a proper seal. The contractor argued that he lowered the gates under the Corps direction, and that the lack of a water tight seal was due to bad maintenance and age. The Corps believed that all that had to be done to solve the problem was to lift the gates, clean out any rock or debris, and reseal.

The Corps' attorney suggested the use of an ADR technique because normal negotiations had not been successful, and the attorney felt the Corps did have some liability. As a result he assessed the Corps' chance of winning the case in front of the Claims Board at only 60%/40%. He proposed non-binding arbitration because the claim was small enough ($185,000) that he didn't believe it would justify the amount of senior management time a mini-trial would require. The contractor's in-house attorney was amenable to non-binding arbitration, but his external attorney was cautious, fearing that the arbitrator would simply split the distance without really evaluating the legitimacy of the claims.

Normally, non-binding arbitration is done with a single arbitrator, but in this case the parties agreed to have a three-person panel consisting of an expert in contract law and two cement construction experts.

The hearing in front of the panel lasted two days. The panel felt that both parties had liability, and determined that the contractor was 55% responsible for the additional costs. However, the panel did not accept the documentation of costs submitted by the contractor, and used an audited statement of costs prepared by the Corps. The panel recommended a payment of $57,000.

A settlement agreement was signed and the contractor paid, but then the contractor filed an additional claim for $21,000 to recover legal fees. The claim was based on the Equal Access to Justice Act, which states that in out-of-court settlements, the claimant is entitled to legal fees. This issue had not been addressed in the non-binding arbitration agreement. Ultimately the Claims Board ruled against the contractor on this claim. Corps guidelines on the use of ADR have been re-written to ensure that in the future the issue of legal fees is part of the ADR settlement.

APPENDIX II - A SHORT GLOSSARY OF ADR TECHNIQUES

Collaborative Problem-Solving:

Collaborative problem solving is a joint effort of the parties to achieve an agreement which meets all the parties' interests. Unlike normal negotiations, it does not begin with the parties taking fixed positions. Rather, the parties jointly define their interests and jointly attempt to develop a solution that meets all those interests.

Disputes Review Panel/Disputes Review Board:

A disputes review panel or board is a panel of technical experts selected by the parties to a dispute to recommend how the dispute should be resolved. Acceptance of the panel's recommendation is voluntary, but normally this recommendation carries considerable weight. As used in the Corps of Engineers, the panel may serve for the life of a construction project, making recommendations on a number of disputes.

Facilitation:

Facilitation is the use of a third-party neutral, impartial to the issues being discussed, to provide a process which increases the chances of finding a mutual agreement. The facilitator will assist with structuring the meetings, make sure all parties feel listened to, help keep meetings on track, suggest procedures for resolving issues, etc.

Med-Arb:

Med-Arb is a hybrid of mediation and arbitration. The parties work with a mediator to resolve as many issues as possible by mutual agreement. By prior agreement, all issues that are not resolved directly by the parties are submitted to an arbitrator for an opinion. Because Federal legal practice prohibits binding arbitration, Corps managers could use this technique only if the arbitrator's ruling constituted a recommendation which was to be accepted voluntarily by the parties.

Mediation:

Mediation is the use of a neutral third-party, acceptable to the parties, who will assist the contending parties in negotiating a mutually acceptable agreement or settlement. The mediator has no decision-making authority, but may carry proposals between the parties, may help parties shape proposals, or may suggest or control the timing of meetings between the parties.

Mini-Trial:

A mini-trial is a settlement procedure in which both sides present an abbreviated version of their case to senior management representatives of the parties. Following this presentation, the management

representatives attempt to reach a negotiated agreement. The procedures to be used during the presentation are governed by a mini-trial agreement, approved by the management representatives.

Neg-Reg:

The term "Neg-Reg" is a hybrid between "negotiation" and "regulation." The term describes a process in which a regulatory agency that is preparing to promulgate regulations establishes a panel with representation from all the parties who have a stake in the contents of the regulation. To the extent possible, the wording of the regulation is negotiated by the panel. The wording generated by the panel is then incorporated into the proposed regulations issued by the agency. These proposed regulations then go through a public hearing process. The agency may revise the regulations before issuing them, based on the public comment received.

Non-Binding Arbitration:

Non-binding arbitration involves the submission of a dispute to an individual or panel to recommend how the dispute should be resolved. Arbitration can be either binding or non-binding. A non-binding recommendation must be voluntarily accepted by the parties, but normally is influential. Since Federal legal practice currently prohibits binding arbitration, only non-binding arbitration is currently used by the Corps.

Partnering:

Partnering is a preventative approach to dispute resolution used during contract performance. Following award of contract, the contractor is invited to join in Partnering. Key participants from the Corps and contractor go through a teambuilding session of several days to a week in length during which they develop goals for the project, and agree on dispute resolution approaches and an implementation program. Usually there are quarterly meetings during which the parties evaluate how they are doing and work together to solve problems that have arisen.

Teambuilding:

Teambuilding is initiated through the events of a workshop during which participants go through structured activities designed to build relationships, improve communication, and build a strong commitment to teamwork.

APPENDIX III - THE CORPS OF ENGINEERS ADR PROGRAM

The Corps of Engineers ADR program was the outgrowth of two major challenges facing the Corps of Engineers: 1) the environmental controversy surrounding many Corps civilian water projects; and 2) a dramatic increase in the number of contractual disputes, coupled with delays in getting disputes resolved through the administrative appeals processes.

Like most agencies with responsibilities in the natural resources arena, beginning in the late 1960s the Corps became increasingly involved in environmental disputes surrounding Corps flood control and water development projects, and later, the Corps' regulation of the Nation's wetlands. Many projects became bogged down in bitter disputes and controversy. In an effort to address public concerns before projects became polarized, the Corps of Engineers initiated a major program to provide opportunities for public involvement in Corps decision making. In addition to requiring public involvement in decision making, the Corps developed a program to train and provide technical assistance to staff responsible for public involvement activities. The Institute for Water Resources, a Corps policy think-tank, was responsible for the development of four levels of public involvement training, for the development of numerous guides and readers, and for providing direct technical support. Hundreds of Corps staff, from the executive level to junior planners, received some form of public involvement training in an effort to "institutionalize" public involvement as a way of doing business in the Corps. The Corps also began to experiment with the use of new approaches to resolution of controversies, such as the use of mediation and new forms of negotiation designed to result in a mutually acceptable outcome.

By the early 1980s, the Corps was facing a new challenge. The mechanisms for resolving disputes between the Corps and its contractors was becoming so costly and protracted that new ways needed to be found to resolve these disputes.

Normally these disputes would be resolved in an administrative law proceeding which could culminate in a decision by the Corps of Engineers Board of Contract Appeals. (Engineer Board). While this administrative procedure was designed to be an expedited process, by the 1980s the time between filing an appeal and receiving a decision ran from 2 to 4 years. These delays are even more ironic because the present system, composed of agency Boards of Contract Appeals, was itself intended as an alternative to litigation in the Court of Claims.

Since the enactment of the Contracts Disputes Act of 1978, caseloads of the Board of Contract Appeals have risen dramatically, while the number of administrative law judges has remained about the same. The number of docketed appeals before the Armed Services Board of Contract Appeals doubled between 1978 and 1988. Between 1982 and 1988, the Engineer Boards docket grew from nearly 200 cases to over 350 cases. The resulting delays put a burden on both the contractor and the Corps.

In addition to time delays, the Corps was also concerned with the overall costs of litigation and the disruptions to management in defending litigation. Litigation involves not only an attorney's time but also the time of any other Corps personnel directly connected with establishing the factual basis for the claim.

Technical experts, auditors, and managers may spend hundreds of hours in preparing cases, and all of that time and resource is diverted from other valuable projects.

Finally, protracted disputes can do grave harm to the business relationship between the Corps and its contractors. In many cases, both the Corps and its contractors wish to preserve a relationship, despite a specific dispute, but the protracted dispute resolution process produces such economic hardship or ill-will that it makes future business dealings difficult or unrealistic.

In 1984 the Corps began a pilot program using an Alternative Dispute Resolution technique called the Mini-Trial. The Mini-Trial technique proved effective in resolving several complex contract disputes, and the Corps also began to use techniques such as Dispute Review Boards and Non-Binding Arbitration on a pilot basis. The techniques were promising, but it was clear that they represented a substantial departure for many Corps staff, and that training and other technical assistance would need to be provided.

In 1988, Lester Edelman, the Corps' Chief Counsel, developed the Corps ADR Program, and turned to the Institute for Water Resources to implement the program. The ADR Program is a three-tier program designed to encourage the use of Alternative Dispute Resolution techniques. The three-tier approach is based on the successful model to institutionalize public involvement that the Corps of Engineers used in the late 1970s and early 1980s. The three tiers are training; research and development and evaluation; and field assistance and networking.

Training

If ADR is to be adopted, old attitudes must change. The Corps has found that mindsets can be changed, and skillfully developed training is crucial to this change. The key is to reach a broad cross section of the organization. This cannot be done on a "one-shot" approach. Therefore, the Corps developed an ADR training program that would become part of the mainstream training options for managers and executives.

Annually over the last five years, the Corps has presented two to four sessions of a five-day conflict management and negotiations training course for mid-level to senior-level employees. More than 813 Corps employees have attended this course, which covers ADR philosophy, techniques, applications, negotiations and bargaining. The course is built on a "learn-by-doing" model.

Over the years, many of the mid-level managers responded positively to the training course but also said that their senior supervisors would not let them implement the techniques and philosophies they had learned. The Corps has now developed and conducted a number of two-day executive training courses for all senior Corps' executives and commanders that will complement the five-day training. The Chief of Engineers has personally encouraged executives to attend the training and implement ADR procedures. Approximately 135 senior commanders and senior executives have attended this training.

This course exposes senior executives to the range of ADR techniques and asks them to encourage their subordinates to use ADR. The course is designed to acquaint managers with the strategic options available to them for resolving disputes.

The overall objective is to establish executive and mid-level management training that will be available on a routine basis and included in the core curriculum of managers as they progress up the supervisory ladder within the organization.

Field Assistance and Networking

Technical assistance is vital to adopting new ideas in any organization. The technical assistance program supports Corps field activities by:

- Designing special "on-site training," based on specific real-time problems
- Helping commanders prepare for negotiations by: scoping optional approaches to negotiations/ bargaining; identifying issues, interests and positions of major interested parties
- Assisting in the development of single-text negotiation techniques including drafting and revising text
- Applying principles of interest-based bargaining, conciliation, mediation, and third-party intervention to specific Corps functions
- Mediating disputes both where the Corps is a party and where the Corps is a facilitator
- Employing ADR techniques to internal Corps conflict situations where appropriate and requested by field offices and others
- Assisting field offices in locating and employing credible third parties where needed

Research and Evaluation

Like all programs, ADR evaluation and feedback is important, but rarely done. The ADR program is setting up a monitoring program to determine what works and what does not work, and how the costs and benefits should be assessed. A number of case study assessments have been completed (see a list of available case studies on the inside of the back cover) and more are planned. Success stories need to be documented and disseminated throughout the agency and the government to show others the possibilities of ADR. Likewise, failures need to be documented to understand the risks associated with applying ADR within an organization. The focus of this evaluation program is case studies and retrospective assessments of lessons learned.

APPENDIX IV - CORPS ADR POLICY

DEPARTMENT OF THE ARMY
U.S. Army Corps of Engineers
WASHINGTON, D.C. 20314-1000

REPLY TO
ATTENTION OF:
CECC-ZA

31 MAR 1993

COMMANDER'S POLICY MEMORANDUM #5

SUBJECT: Alternative Dispute Resolution

1. The policy of the Corps of Engineers to resolve disputes at the first appropriate management level through the use of Alternative Dispute Resolution (ADR) methods is evidence of our commitment to effective and efficient mission accomplishment.

2. The Corps is the recognized leader in the Federal Government in the use of ADR. Prior to the Administrative Dispute Resolution Act of 1990, which mandates the federal use of ADR, Congress used our program for guidance. The Corps has successfully used ADR procedures to resolve disputes in contract claims, environmental restoration and regulation, operations, interagency policy development and real estate transactions. We hope to expand this list to include employment grievances and discrimination claims. Our managers have employed a continuum of ADR methods to promote productive negotiations, including mini-trials, non-binding arbitration, dispute review boards, mediation, and facilitation.

3. We must continue to lead in the ADR arena. We have established a comprehensive program to ensure this goal. Our program trains Corps managers, engineers and attorneys in the skills and knowledge needed to make effective use of ADR. We supplement the training with pamphlets, case studies, research reports, articles, and working papers which provide practical guidance on the use of ADR methods. Finally, we offer assistance and advice on ADR procedures to our own field offices as well as to others, both in and outside the Government.

4. Alternative Dispute Resolution methods are an integral aspect of partnering. All successful partnering arrangements include provisions which refer disputes to ADR.

5. Our ADR policy is sound, and I encourage all Corps members to employ ADR methods to resolve disputes. This will result in quicker and less costly resolution of conflicts and provide an opportunity to build better working relationships.

Arthur E. Williams
ARTHUR E. WILLIAMS
Lieutenant General, USA
Commanding

APPENDIX V - RESOURCES

READING MATERIALS:

General Introduction to ADR:

Carpenter, Susan and W.J.D. Kennedy, Managing Public Disputes: A Practical Guide to Handling Conflict and Reaching Agreements, Jossey-Bass, San Francisco, 1989.

One of the basic texts in the field. Provides an excellent overview of the principles of collaborative problem-solving, mediation, and negotiation, applied to public policy.

Carr, Frank and Lester Edelman, "The U.S. Army Corps of Engineers Perspective on ADR and Partnering in the Construction Industry," Wiley Construction Law Update, Wiley Law Publications, 1994.

Gray, Barbara, Collaborating: Finding Common Ground for Multiparty Problems, Jossey-Bass, San Francisco, 1989.

Another excellent overview to all forms of collaborative dispute resolution, applied to public policy issues.

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Henry is the President of the Center for Public Resources, the leading advocate for ADR in corporate America. The book is primarily an argument for why ADR should be used instead of litigation, including case histories from several corporations.

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Interpersonal Disputes:

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This is a cross between a text and a workbook, with practical guidance on effective listening, one of the crucial skills for ADR.

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Although written for couples, the book provides an excellent summary of the basic attitudes and skills for resolving conflict in emotionally-charged situations. Provides a good introduction to listening and sending skills.

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This book, along with Gordon's classic Parent Effectiveness Training, was the primer for much of the work on communications skills in the ADR field.

Interest-Based Negotiation:

Fisher, Roger and William Ury, Getting to Yes: Negotiating Agreement Without Giving In, Penguin Books, New York, 1983.

This classic book introduced the concept of interest-based negotiation, and still provides the best short description. The book is extremely easy to read, and is written for the general public. This would be a good book for all parties to read prior to partnering, collaborative problem solving, or interest-based negotiation.

Legal Aspects of ADR

Carr, Frank, James T. Delaney, and Joseph M. McDade, Jr., "Alternative Dispute Resolution: A Streamlined Approach to Resolving Differences," NCMA T.I.P.S., February 1995.

CPR Legal Program, [Fine, Erika S. and Elizabeth S. Plapinger, Editors], Containing Legal Costs: ADR Strategies for Corporations, Law Firms, and Government, Butterworth Legal Publishers, New York, 1988.

This is a collection of articles on the use of ADR in a wide variety of situations. It includes articles on the use of ADR in the Corps of Engineers. Articles cover a range of applications including international ADR, and the use ADR in product liability disputes, toxic tort disputes, cost allocation in hazardous waste disputes, employment disputes, and technology disputes.

CPR Legal Program, [Fine, Erika S. and Elizabeth S. Plapinger, Editors], ADR and the Courts: A Manual for Judges and Lawyers, Butterworth Legal Program, New York, 1987.

A series of articles primarily concerned with the use of ADR within the court system. It covers such topics as semi-binding forums, settlement strategies, early disposition strategies, discovery management, and summary judgment.

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Donovan Leisure is a law firm in which a number of attorneys are interested in ADR. This is a collection of articles on ADR written by attorneys providing an overview of ADR. Sections include topics such as: Advantages of ADR, Obstacles to ADR, The Forms of ADR and How They Work, Legal Objections to Binding Arbitration at the Federal Level, Personal Experiences with Corporate ADR, Contract Clauses for Non-binding ADR, and many other topics.

Mediation:

McCarthy, Jane with Alice Shorett, Negotiating Settlements: A Guide to Environmental Mediation, American Arbitration Association, Washington D.C., 1984.

This is a brief (100 pages) overview of environmental mediation, written from the perspective of an experienced practitioner. A good introductory guide.

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Moore, Christopher W., Mediation, Corps ADR Series 91-ADR-P-3, Institute for Water Resources, Fort Belvoir, Virginia, 1991.

This pamphlet provides a brief overview to mediation for Corps managers.

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This pamphlet provides a brief overview of mini-trials for Corps managers.

Non-Binding Arbitration

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This is the Corps ADR Series pamphlet on non-binding arbitration.

Partnering

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This is the Corps ADR Series pamphlet on partnering, providing an overview of the topic for Corps managers.

NEWSLETTER:

Consensus, MIT-Harvard Public Disputes Training, Harvard Law School, Program on Negotiation, 513 Pound Hall, Cambridge, MA, 02138.

This is a quarterly newsletter published by the MIT-Harvard Public Disputes Program and distributed free of charge to public officials. It highlights successful cases of ADR, and includes a list of ADR consultants, and information about new guides or publications. Write to receive a free subscription.

TRAINING:

Corps of Engineers Training:

The Corps of Engineers provides a two-day Executive Seminar on Alternative Dispute Resolution and a one week course on Negotiation at sites throughout the country. For information contact the U.S. Army Engineering and Support Center, Huntsville, Alabama, 205-722-5834.

CONSULTANTS:

There are numerous qualified ADR consultants, some of whom are quite familiar with the Corps of Engineers. For information contact Dr. Jerome Delli Priscoli or Ms. Donna Ayres, Institute for Water Resources, Fort Belvoir, Virginia, 703-428-6372.

APPENDIX VI - BIBLIOGRAPHY[14]

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13. ABSTRACT *(Maximum 200 words)*

This guide provides an overview of the basic concepts behind alternative dispute resolution (ADR). It describes the range of ADR techniques available to managers in the U.S. Army Corps of Engineers, from dispute prevention processes (e.g., Partnering), to unassisted procedures (information exchanges meetings, interest-based negotiation), to third-party assistance (facilitation, mediation, fact-finding, mini-trial, disputes review board, and non-binding arbitration), and third-party decision making. The document defines ADR and its benefits and illustrates through case studies how the Corps has used ADR techniques. The guide also provides a framework for choosing an ADR technique. In addition, it includes policy and legal mandates for the use of ADR, a glossary or terms, list of resources, and a lengthy bibliography of ADR references.

14. SUBJECT TERMS
Alternative dispute resolution, ADR, interest-based negotiation, facilitation, mediation, fact-finding, mini-trial, third-party assistance & decision making

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